

STATE OF CALIFORNIA

Arnold Schwarzenegger, Governor

DEPARTMENT OF INDUSTRIAL RELATIONS
OFFICE OF THE DIRECTOR
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July 20, 2005

David F. Beatty, Esq.
McDonough Holland & Allen PC
555 Capitol Mall, 9th Floor
Sacramento, CA 95814-4692

Re: Public Works Case No. 2003-014
Phase II Residential Development
Victoria Gardens, City of Rancho Cucamonga

Dear Mr. Beatty:

This constitutes the determination of the Director of Industrial Relations regarding coverage of the above-referenced project under California's prevailing wage laws and is made pursuant to Title 8, California Code of Regulations, section 16001(a). Based on my review of the facts and the factual assumptions you provided, and an analysis of the applicable state law, it is my determination that development of the 22-acre residential option parcel at Victoria Gardens ("Phase II Residential Development") is not a public works subject to the payment of prevailing wages.

Factual Background

Victoria Gardens is a mixed-use development situated on 147 acres ("Site") in the City of Rancho Cucamonga ("City"). The development plan envisions the creation of a "new downtown" with "retail, office, hotel, residential, civic and cultural uses ... placed within a landscaped urban experience of a traditional Main Street development." (Master Plan ("MP"), p. 6.) The various elements of the development are "linked ... through a gridded street system ... complemented by [a] Town Square, Town Green and smaller plazas in the heart of downtown." (MP, pp. 13-14.) The Developer is Victoria Gardens-C, L.L.C., a California Limited Liability Company ("Developer").

The disposition and development of the Site are governed by terms and conditions set forth in a Disposition and Development Agreement ("DDA") between the Rancho Cucamonga Redevelopment Agency ("Agency") and Developer, dated February 20, 2002. The development of the Site is also governed by the terms of a Development Agreement between Developer and City of the same date. Under the DDA, Developer is committed only to the completion of construction of Phase I ("Regional Mall"). Any additional development ("Phase II") is undertaken at the election of Developer. (DDA, p. 4; 33343 Summary Report, p. 2.)

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Phase I

Developer will construct most of the commercial and retail space within the Regional Mall, including finished structures, building shells and building pads. Three department stores have agreed to construct on improved pads purchased from Developer. (DDA, p. 17.) American Multi-Cinema, Inc. ("AMC") is constructing a 12-auditorium theater complex pursuant to a sublease with Developer, and other entities may also construct on improved pads subleased from Developer. As an integral part of the Regional Mall development, Agency has committed to construct a Cultural Center, open air plaza and parking structure on approximately 1.67 acres of the Site, which is a parcel retained by Agency and excluded from the sale of the 147-acre Site to Developer, memorialized in a promissory note of equal date with the DDA.

Phase I is estimated to cost Developer between \$88,300,000 and \$110,600,000. The cost to Agency is estimated to be in excess of \$26,000,000. The Cultural Center is estimated to cost \$20,000,000, which is to be paid from proceeds of a tax allocation bond issue and Community Facilities District No. 2. Under the DDA, Agency is required to deposit with Developer the sum of \$2,000,000, which Developer has agreed to draw upon to construct street improvements and freeway landscaping prior to the commencement of the construction of the Cultural Center. Agency also advanced approximately \$8,000,000 to Community Facilities District No. 1 to pay for infrastructure improvements in the surrounding area.

Developer represents that prevailing wages are being paid in the Phase I construction. This representation is supported by the relevant contracts, bid packages and related agreements.

Phase II

Phase II development is optional, to be developed at the election of Developer. Developer advises that it intends to sell an approximately 22-acre parcel zoned for residential development ("Residential Parcel") to an unrelated third party for the construction of 500-600 multi-family residential units. Developer has graded the Residential Parcel as part of grading the 147-acre Site and installed streets bordering both the Residential Parcel and the Regional Mall. Otherwise, this parcel is to be sold undeveloped.

In addition, Developer intends to develop with commercial and retail space an approximately 14-acre parcel located south of Victoria Gardens Lane. Developer intends to sell and ground lease

property within this 14-acre parcel for development of commercial and retail buildings by third party buyers and lessees.¹

Developer has requested a coverage determination concerning Phase II Residential Development² that is based on the following assumptions: Developer (1) will sell the Residential Parcel (2) to an unrelated third party developer (3) for fair market value and (4) the private residential units will be constructed entirely with private funds on private property and (5) not by the third party developer pursuant to an agreement with a state agency, redevelopment agency or local housing authority.

Discussion

Labor Code section 1720(a)(1)³ generally defines "public works" to mean, "Construction, alteration, demolition, installation or repair work done under contract and paid for in whole or in part out of public funds"

Under the assumptions provided by the Developer, Phase II Residential Development would qualify as construction done under contract. A determination whether Phase II Residential Development would be paid for with public funds requires an analysis whether it is an integrated part of a larger project including Phase I or is a separate project. If Phase II Residential Development is an integrated part of a larger project, which is paid for in whole or in part with public funds, then prevailing wages would apply to the entire larger project. If it is a separate project, it would be necessary to determine whether Phase II Residential Development by itself fulfills the elements of a public works.

¹ Developer represents that it has not exercised the option to develop the 14-acre parcel. Until such option is exercised and the facts concerning development of this parcel are known, the issue whether prevailing wage obligations would be owed cannot be ascertained.

² Originally, the Department received a public works coverage request concerning Phase I, the Regional Mall. Subsequently, the requesting party withdrew that request. Normally, in order to determine whether Phase II Residential Development is a public works, an analysis would be performed of all the various construction undertakings involved in Phase I and II under the factors set forth in PW 2000-016, Vineyard Creek Hotel and Conference Center/Redevelopment Agency, City of Santa Rosa (October 16, 2000). This analysis would determine whether the various construction undertakings constitute one or several projects. Here, however, the same result as to Phase II Residential Development obtains no matter the public works status of Phase I and, therefore, an analysis as to Phase I need not be performed. In other words, even if all the work involved in Phase I were a single integrated public works project, Phase II Residential Development, for the reasons provided herein, would nonetheless be a separate project.

³ All statutory references are to the California Labor Code unless otherwise specified.

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In the precedential case of PW 2000-016, *Vineyard Creek Hotel and Conference Center/Redevelopment Agency, City of Santa Rosa* (October 16, 2000), the Director set forth factors to be examined on a case-by-case basis to determine whether a construction undertaking is part of a single integrated project or is a separate project. These factors include:

(1) the manner in which the construction is organized in view of, for example, bids, contracts and work force; (2) the physical layout of the project; (3) the oversight, direction and supervision of the work; (4) the financing and administration of the construction funds; and (5) the general interrelationship of the various aspects of the construction ... In making this finding, it is the analysis of the above factors, not the labels assigned to the various parts of the project by the parties that controls.

Here, these factors are applied to analyze the relationship between Phase II Residential Development and Phase I work involving the Regional Mall.

With respect to the first *Vineyard Creek* factor, there is no single agreement unifying or defining the relationship between Phase I and Phase II Residential Development. Phase II is not covered by the DDA, other than as an option parcel to be constructed at the discretion of Developer. The third party developer of the Residential Parcel is neither a party to the DDA nor to the Development Agreement. The DDA is not recorded against the Residential Parcel and Agency has no right to approve or disapprove the sale of the parcel to a third party developer. The residential work will be contracted separately by a third party developer removed from the Phase I construction under separate contracts with different workforces.

As to the second factor, the physical layout, Phase II Residential Development will be built on a parcel at the Site that adjoins the Regional Mall. The parcel was graded by Developer.

As to the third factor, there would not appear to be any common oversight, direction or supervision of the construction of the Regional Mall and Phase II Residential Development. City and Agency will exercise no apparent control over the development of the Residential Parcel other than the typical zoning, design review, permit and inspection requirements.

With respect to the fourth *Vineyard Creek* factor, there is no apparent interconnectedness in the financing or administration of construction funds between Phase I and Phase II Residential Development. The residential construction will be separately

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financed with private funds. The Residential Parcel will be sold by Developer at fair market value to an unrelated third party in an arms-length transaction.⁴

Finally, as to the general interrelationship of the various aspects of construction, while Phase I and Phase II Residential Development are complementary elements of the "new downtown," they are in important aspects stand-alone construction projects. There does not appear to be any further interrelationship between construction of the Regional Mall and Phase II Residential Development.

The facts of this case are similar to PW 2003-022, *Chapman Heights/City of Yucaipa* (January 30, 2004), which involved the construction of merchant builder residential developments and adjacent infrastructure improvements. In *Chapman Heights*, the relationship between the privately-funded housing and the publicly-funded infrastructure was found "too attenuated" and therefore not grounds for finding the parts to be integrated. Similarly, here, the relationship between the Regional Mall and Phase II Residential Development is too attenuated to find that Agency subsidies to Developer passed in Phase I through to the residential construction in Phase II.

In view of the known and assumed facts of this case, which include independent construction undertakings, no oversight or supervision of Phase II Residential Development by Agency or Developer, private funding of Phase II Residential Development and the fair market value transfer of the Residential Parcel, Phase II Residential Development is deemed to constitute a separate project insulated from the public subsidies received by Developer for Phase I. As to whether Phase II Residential Development as a separate project would fulfill the elements of a public works, it is construction done under contract; it would not, however, meet the definition of a public works because it will not, under the assumptions provided by Developer, be paid for in whole or in part with public funds.

Conclusion

Based on the foregoing, I find that Phase II Residential Development is not a public works subject to the payment of

⁴ The purchaser has the burden to demonstrate that the property was purchased at fair market value. A property's fair market value is determined by a bona fide and credible appraisal. The appraiser should be credentialed by the state and be a member of the Appraisal Institute or have similar training and experience. (See, e.g., PW 2003-040, *Sierra Business Park/City of Fontana* (January 23, 2004).)

Letter to David F. Beatty, Esq.

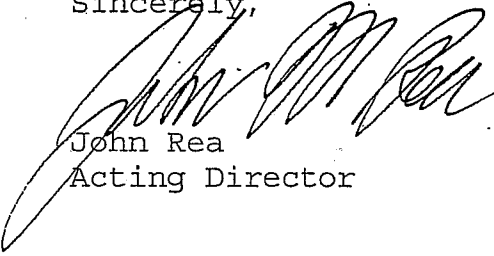
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prevailing wages. If the assumed facts concerning this project change, a different result may obtain.

I hope this determination satisfactorily answers your inquiry.

Sincerely,

A handwritten signature in dark ink, appearing to read "John Rea", is written over the typed name and title.

John Rea
Acting Director

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